

**NO. 44133-1**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH BERGMAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Beverly Grant, Judge

No. 12-1-02489-0

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State presented sufficient evidence that defendant entered a "building" or "fenced area" where defendant entered and removed scrap metal from the Tacoma Metals storage yard which was completely enclosed by a combination of fencing and barricades.

B. STATEMENT OF THE CASE.

1. Procedure

On July 5, 2012, the Pierce County Prosecutor's Office charged appellant, Kenneth Bergman, hereinafter referred to as "defendant," by information with one count of burglary in the second degree (Count I), and one count of theft in the second degree (Count II.) CP 1-2.

The case was assigned to the Honorable Beverly G. Grant and initiated with a 3.5 hearing on October 11, 2012, which determined that statements defendant made to Port of Tacoma officers would be admissible at trial. 1 RP<sup>1</sup> 1, 4, 18-19. The case proceeded to a jury trial on October 16, 2012.

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<sup>1</sup>The State will refer to the Verbatim Report of Proceedings of the trial as Volumes I-II and are sequentially paginated. For clarity, the record will be referred to by volume number followed by the page in that volume. The bail hearing is included separately and will be referred to on the record by date.

The jury convicted defendant on Count I and found him not guilty of Count II. 1 RP 204; CP 76, 77.

On October 26, 2012, the Court sentenced defendant to a drug offender sentencing alternative (DOSA) term of 29.75 months confinement, and 29.75 months in community custody. 1 RP 215-216. The standard range for Count I was 51 to 68 months. 1 RP 209; CP 97. Defendant's offender score was a 9+. 1 RP 214; CP 97.

On May 17, 2012, defendant's appellate counsel filed a motion to withdraw as counsel pursuant to *Anders v. California*. Defendant filed a pro se Statement of Additional Grounds on July 8, 2012. CP 130<sup>2</sup>. On November 18, 2012, the Court Commissioner found defendant's appeal to be frivolous and affirmed his judgment and sentence. CP 131. Nielson, Broman, & Koch was appointed as substitute counsel by ruling dated July 1, 2013. CP 133. Defendant filed a motion to modify the commissioner's November 18, 2013, ruling. The Court granted the motion on February 5, 2014, giving defendant's counsel 45 days to file an advocate brief.

Defendant filed his appellant brief on April 4, 2014, challenging only the sufficiency of the evidence regarding Count I, second degree burglary. Br. App. at 1.

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<sup>2</sup> The State filed a supplemental designation of clerk's papers for the Copy of Ruling from COA/SC dated 11/19/2013 and refers to the document as CP 127-131.

## 2. Facts

Tacoma Metals is a buyer and supplier of nonferrous scrap metal, located in an industrial area in the Port of Tacoma. 1 RP 118. Two fences secure the entire property except for an area in the southeast corner, located on Thorne Lane and East 19th, which contains a treatment plant and two entrances. 1 RP 122-23, 161, 168, 170. Both entrances are located on Thorne Lane on either side of the treatment plant. The main entrance is blocked by posts, chain, padlock and a "No Trespassing" sign. 1 RP 122, 169. The driveway to the second entrance enters an outside storage yard, hereinafter referred to as "storage yard," which leads to an access road that goes through the property. 1 RP 124, 168.

On July 4, 2012, defendant and Hall entered the storage yard. 1 RP 120-21; 2 RP 13. The perimeter of the storage yard is enclosed on all sides by the treatment plant, large piles of storage containers, metals, truck trailers, the fence, a cement wall, and three roll-off boxes<sup>3</sup>. 1 RP 123; Ex. 8, 10-11, 14-15. The roll-off boxes form a barricade across the entrance driveway and the storage yard. *Id.* Five to six "No Trespassing" signs are posted around the perimeter of the property, including on the street side of the storage yard and on the main entrance. 1 RP 122-23, 128.

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<sup>3</sup> A roll-off box is a 20 to 30 foot box that may be filled with materials and loaded on the back of a semi-truck. 1RP 123. Andrew Matthei, the Tacoma Metals supervisor, testified that the roll-off boxes are placed in the driveway to prevent people and cars from entering the property after hours. *Id.* Exhibits 10 and 11 are photographs of the roll-off boxes.

On the evening of July 3, 2012, Michael Hall entered the storage area, loaded three four to six gallon buckets with approximately 200 pounds of Cooper nickel, and placed them on a pallet jack<sup>4</sup>. 1 RP 128-31, 144; 2 RP 14-15, 17. On July 4, 2012, Hall returned to the storage area of Tacoma Metals, which was closed for the holiday, with defendant and removed three buckets of scrap metal from the property. 1 RP 122-23; 2 RP 14. Mr. Matthei, the yard supervisor, saw defendant and Hall on Tacoma Metals property in the storage yard via the surveillance camera and called the police. 1 RP 118-119, 121; Ex. 15. Mr. Matthei testified that he saw the two men pull pallet jacks loaded with the three buckets towards the roll-off boxes. 1 RP 121, 144; Ex. 15. Additionally, he testified that defendant and Hall did not have permission to enter the property or to remove metals on that date. 1 RP 121.

John Weinzierl and Barbara Salinas, police officers for the City of Tacoma, and Martin Kapsh, a patrol officer with the Port of Tacoma, responded to the 911 call. 1 RP 87, 156, 165. The officers found defendant and Hall walking on the public sidewalk of Thorne Lane in front of

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<sup>4</sup> A pallet jack, also referred to as a drum cart, is a manual fork lift mounted on small wheels. Exhibits 7 and 9 are photographs of a pallet jack in front of a truck trailer in the storage yard.

Tacoma Metals, stopped, and questioned them. 1 RP 7, 88, 102-03, 157-58. The officers observed that defendant's hands and arms were black and dirty, and that Hall's hands and elbow area were embedded with dirt and small pieces of rock. 1 RP 92, 159, 171. Defendant told the police that he and Hall were going to BJ's Bingo Casino in Fife. 1 RP 89, 158. The officers spoke with Mr. Matthei, who identified defendant and Hall as the men he had seen stealing metal on the surveillance system. 1 RP 88-92.

The officers located the buckets of metal in the driveway of the second entrance of Tacoma Metals, on the street side of a roll-off container. 1 RP 91, 106, 162, 170; Ex. 12-13<sup>5</sup>. Because defendant and Hall had already removed the buckets from the storage yard, the officers were able to walk up the driveway to the buckets without climbing over any barriers or fencing. 1 RP 162; 2 RP 7.

Hall and the defendant were subsequently arrested for burglary and theft and transported to the jail. 1 RP 167, 171; 2 RP 12-13.

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<sup>5</sup> Exhibits 12 and 13 are photographs of the three white buckets filled with scrap metal, located in the driveway of Tacoma Metals, on the street-side of one of the three roll-off boxes that barricades the storage yard.



C. ARGUMENT.

1. SUFFICIENT EVIDENCE SUPPORTS THAT THE STATE PROVED ENTRY INTO A "BUILDING" OR "FENCED AREA" BECAUSE THE STORAGE YARD WAS COMPLETELY ENCLOSED.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

In the present case, the court instructed the jury that the State must prove each of the following elements in order to find defendant guilty of burglary in the second degree:

- (1) That on or about the 4th day of July, 2012, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That this act occurred in the State of Washington.

CP 58 (Instruction #14); *see also* RCW 9A.52.030(1). The court also instructed the jury that “[b]uilding, in addition to its ordinary meaning, includes any fenced area. Building also includes any other structure used mainly for carrying on business therein or for the use, sale or deposit of goods.” CP 55 (Instruction #11).

Washington's criminal code does not define "fenced area." RCW 9A.04.110(5). In 1975, the Washington State Legislature enacted a new criminal code and made substantial changes to the burglary laws. *Id.* The new statutory definition of "building" includes "fenced area." *Id.* The

Supreme Court interpreted the term "fenced area" in the new burglary statute for the first time in *State v. Wentz*, 149 Wn. 2d 342, 68 P.3d 282 (2003). The Court determined "the State need not show that the fence was erected mainly for the purpose of protecting property within its confines." *Wentz*, 149 Wn.2d at 350. The Court declined to further define "fenced area," and affirmed that the "six-foot, solid fence with padlock gates" fit within the ordinary meaning of "fenced area." *Wentz*, 149 Wn.2d at 352.

Justice Madsen wrote a concurrence in which she argued that "the burglary statutes and the definition of building " . . . show that the legislature intended a more restrictive view of 'fenced area.'" *Wentz*, 149 Wn.2d at 353. Madsen reasoned:

"[t]he fence must serve to circumscribe an area so as to protect property or people-to close off the space from unwanted intruders. Unlike the majority, I believe the underlying theory of the burglary statutes is the protection of persons or property and punishment for invasions that involve a risk of criminal harm or actual harm to persons or property."

*Wentz*, 149 Wn.2d at 357 (Madsen, J. concurring). Therefore, Madsen proposed to define "fenced area" as a "contained or enclosed space." *Wentz*, 149 Wn.2d at 355.

Furthermore, Madsen suggested that the burglary statute does not require a fence to be impenetrable:

I do not believe the legislature intends that an impenetrable barrier is required, but there must be a barrier designed for the security of people or the contents of the enclosed area."

*Wentz*, 149 Wn.2d at 357; 68 P.3d at 289 (Madsen, J. concurring).

The Supreme Court formally adopted Madsen's interpretation of "fenced area" in *State v. Engel*, 166 Wn.2d 572, 180, 210 P.3d 1007, 1010 (2009), holding that to qualify as a "fenced area," the area must be completely enclosed, either by fencing alone or by a combination of fencing and other structures. The *Engel* court rejected the State's argument that a combination of fencing and natural, topographical barriers constituted a "fenced area," because under that definition:

"would-be petty criminals who trespass might be liable for burglary even if the property line at their point of entry were unfenced and unmarked, even if they remained on the property without approaching any buildings or structures, and even if the property were such that they could enter and remain without being aware that it was fenced. Such examples are well outside the category of offences the legislature intended to punish as burglary."

*Engel* at 166 Wn.2d 580. The Court was hesitant to hold an individual criminally liable for burglary where they may not have known they had trespassed. The Court did not directly address whether the fence must be impenetrable.

On appeal, defendant argues that the state failed to present sufficient evidence to prove the second element of the "to convict" instruction, whether defendant entered or remained unlawfully in a building. Br.App. at 6.

The State presented sufficient evidence that the storage yard of Tacoma Metals was a "fenced area" as defined by *Engel*. Furthermore, sufficient evidence showed that defendant was on notice that Tacoma Metals was closed to the public on July 4, 2012, a holiday. Mr. Matthei, Officer Salinas, and Officer Weinzierl described the Tacoma Metals property in detail during their testimony. 1 RP 112, 122-25, 168-70. The jury was shown eight photographs of the storage yard, the roll-off boxes that barricade the entrance to the storage yard, the buckets filled with scrap metal and the surveillance video from July 4, 2012. Ex. 7-15.

Two fences, hereinafter referred to as "the fence," surround the entire Tacoma Metals property except for an area at the southeast corner of Thorne Lane and East 19th. 1 RP 122-23, 168. The first is a cyclone fence that is approximately 6 feet high topped with concertina or barbed wire. 1 RP 122, 168. Located 12 inches inside the cyclone fence is a 10-foot, 10,000 volt, electric wire fence. 1RP 122. Five to six "No Trespassing" signs are prominently posted around the perimeter, including a sign on the chain that blocks the main entrance, a sign on the chain link fence outside the roll-off boxes that barricade the storage yard, a sign facing Thorne Lane, and a sign on the treatment plant. 1 RP 122-23, 128, 169.

Located on the southeast corner of Tacoma Metals is the treatment plant and two driveways that provide entry to the property from Thorne

Lane. 1 RP 122-23, 137-38. In front of the treatment plant, parallel to the pedestrian sidewalk on Thorne Lane, are a chain and a chain link fence that separate the treatment plant from the street. 1 RP 141. On either side of the treatment plant is an entrance to the property.

The driveway of the main entrance is blocked by barricade posts, and secured by a padlocked chain when Tacoma Metals is closed. 1 RP 122, 169. This driveway leads to a parking lot where employees park. 1 RP 122-23. The back side of the parking lot is separated from the north side of the storage yard by metal containers. 2 RP 11.

The second entrance is located directly on the corner of East 19<sup>th</sup> and Thorne Lane, and provides access to a road that goes through the plant. 1 RP 124, 168. This road is blocked by the fence. 1 RP 124-125. Exhibit 7, 9.

The storage yard consists of the enclosed area between the driveway of the second entrance on Thorne Lane and East 19<sup>th</sup> and the fence. The perimeter of the storage yard can be clearly seen in the surveillance tape from Tacoma Metals from July 4, 2012. Ex. 15. The tape shows defendant and Hall inside the storage yard, pulling buckets of metal on a pallet jack towards Thorne Lane. *Id.* Officer Salinas and Mr. Matthei described the perimeter as shown in the video during their testimony. 1 RP 119, 140-41; 2 RP 10-11; Ex. 15. The video shows that the storage yard is completely barricaded. Ex. 15. In the forefront of the video is the fence, which separates the storage yard from the rest of the property. *Id.* The

right side of the perimeter is blocked with piles of containers and a cement wall. *Id.* The treatment center, a tree, and the top of the truck trailer can be seen to the left. *Id.* Three blue roll-off boxes barricade the driveway that leads to the corner of Thorne Lane and East 19th when the business is closed. *Id.* Thorne Lane, which runs parallel to the crosswalk marked with white lines, can only be seen over the top of the roll-off boxes and cement wall. *Id.* The video shows no visible walkway between the storage yard and the street. *Id.*

The jury was shown photographs taken from within the storage yard which show the side of the perimeter between the fence and the treatment plant Ex. 7-9, 14. This side is secured by the fence and barricaded with a white truck trailer, metal containers, and stacked materials. Ex. 7-9, 14; 2 RP 10. 10-12 inches separate the trailer and the fence. 1 RP 127; Ex. 7<sup>6</sup>. Three other similar trailers align the fence. 1 RP 128. This barricade separates the storage yard and the parking lot that is accessed from the main entrance. 2 RP 10-11.

Mr. Matthei and Officer Salinas testified that the roll-off boxes form a barricade across the driveway to block public access to the storage yard when the business is closed. 1 RP 123-24, 137-38, 168-69; Exhibits

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<sup>6</sup> Exhibit 7 is a photograph which shows the 10-12 inch gap between the trailer and the fence.

10-11, 15. Between the roll-off boxes and the treatment plant is a narrow walkway that is obstructed with plants, debris, wooden crates, and other materials. 1 RP 138; 2 RP 14; Ex. 11<sup>7</sup>.

The evidence presented at trial demonstrates a clear line of demarcation that surrounds the storage yard. This case is distinguishable from *Engel*, in which only one third of the business premises was fenced, and the other two thirds were surrounded by sloping banks. *Engel*, 166 Wn.2d at 575. The court determined that natural barriers were insufficient to constitute a "fenced area." *Engel*, 166 Wn.2d at 580. Unlike *Engel*, Tacoma Metals did not depend on natural barriers to block access to the premises, but actively used metal containers and roll-off boxes to barricade the areas not protected by the fence.

In viewing the evidence in the light most favorable to the State, there is substantial evidence that the combination of fencing and other structures fully enclose and contain the storage yard Tacoma Metals. The record shows the storage yard was enclosed by a fence, a cement wall, the treatment plant, and barricaded with roll-off boxes, debris, truck trailers, and metal containers.

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<sup>7</sup> Exhibit 11 is a photograph taken from the driveway looking toward the storage area. The photograph shows the walkway between the building and the roll-off box, which is obstructed with plants, debris, wooden crates, and other materials. Part of the walkway goes under the covered porch, which is also blocked with debris.



Furthermore, the record shows that the combination of the fence and barriers that surrounded Tacoma Metals and the visibly placed "No Trespassing" signs was sufficient to alert defendant that the property was not open to the public. It was not possible for an individual to enter the storage yard without being aware that public access was prohibited. The concern expressed by the Supreme Court in *Engel*, that an individual "could enter and remain without being aware that it was fenced" is not present in this case. *Engel*, 166 Wn.2d at 580. The only incidental gaps in the barricade are the narrow walkway through which defendant and Hall entered the property, and the 10-12 inch gap between the truck trailer and the fence.

The evidence presented at trial shows that the first gap, the walkway through which defendant and Hall removed the buckets of scrap metal, was narrow, difficult to pass through, and partially obstructed. 1 RP 138; 2 RP 9. Hall described the gap as follows: "[a]round that bush there, there's a bit of a walkway." 2RP 14. Officer Salinas entered the barricaded area through this walkway with Matthei. 2 RP 8. She testified that it was "very narrow, like, I believe it was a covered porch" and that she had to squeeze through the containers to enter. 2 RP 8-9; Ex. 11. Matthei testified that it was possible for a person to get through the walkway between the treatment plant and the containers but would have to "climb over stuff." 1RP 138; Ex. 11. There is no evidence that the walkway was marked as a public entrance. On the contrary, Matthew testified that Tacoma Metals

uses roll-off boxes to keep cars and people out when they are closed. 1 RP 153.

The record shows that the second gap, between the fence and a truck trailer that is parked in the barricaded storage yard, is only 10 to 12 inches wide. 1 RP 127; Exhibit 7. Mr. Matthei testified that a person could "squeeze through" this opening. 1 RP 127. Although Mr. Matthei testified that the trailer was not placed specifically for the purpose of blocking access to the barricaded area, three other identical trailers align the fence and block access to the public. 1 RP 127-28.

Moreover, five to six "No Trespassing" signs are posted around the property. 1 RP 128. Multiple signs are located outside the storage yard and on the treatment plant on Thorne Lane. 1 RP 123, 169. Their presence is evidence of the active effort to keep the public off the property. A jury could reasonably infer that defendant and Hall saw the "No Trespassing" signs.

The State presented sufficient evidence for the jury to conclude that defendant and Hall knew the storage yard was not open to the public.

Finally, there is no evidence that a fence must be impenetrable in order to fit the definition under *Engel*. By adopting a definition of "fenced area" that includes a "combination of fencing and other structures," the court did not appear to preclude any fence that might have a small break or

gap. Such a definition would lead to absurd results, such as a situation in which a defendant could walk through a small gate blown open by a storm, squeeze between fence posts or a gap where a fence board has fallen, or easily walk over fencing knocked down by natural forces, and not be found guilty of burglary.

Defendant claims that "there was a substantial gap in the fence around the yard." Br.App. 2. This claim is without merit because in order to enter the barricaded storage yard where defendant and Hall found and removed the buckets of scrap metal, a person either had to squeeze through the walkway between the building and the roll-off boxes or squeeze through the 10-12 inch gap between the trailer and the fence. 1 RP 127. A reasonable jury could conclude that the gaps were unsubstantial.

When considering the evidence in the light most favorable to the State, all of this evidence is sufficient to prove beyond a reasonable doubt that defendant entered a "fenced area" that was completely enclosed or contained.

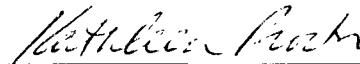
D. CONCLUSION.

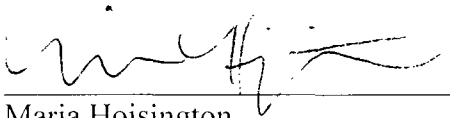
The State presented sufficient evidence to prove that defendant entered into a "building" or a "fenced area" where the storage yard of Tacoma Metals was completely enclosed and barricaded by a fence, treatment plant, trailer, metal containers, cement wall, and roll-off boxes. Further, a reasonable jury could infer that defendant knew the storage yard was closed to the public because an individual could only breach the

barricade by squeezing through two narrow gaps. Finally, the storage yard was visibly marked with "No Trespassing" signs. For the foregoing reasons, this Court should affirm defendant's judgment and sentence.

DATED: July 9, 2014.

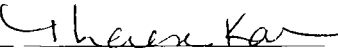
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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

7.9.14   
Date Signature

## PIERCE COUNTY PROSECUTOR

**July 09, 2014 - 11:40 AM**

### Transmittal Letter

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